In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 389

MARIA GARCIA-GONZALES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B 4–13) is reported at 344 F. 2d 804.

JURISDICTION

The judgment of the court of appeals was entered April 28, 1965. The petition for a writ of certiorari was filed July 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was "convicted" of a narcotics offense within the meaning of section 241(a)(11) of the Immigration and Nationality Act.

785-079—65

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251, provides in pertinent part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any

addiction-forming or addiction-sustaining opiate;.

* * * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

Section 1203.4 of the California Penal Code is set forth on pages 3–5 of the petition.

STATEMENT

In November 1961, petitioner, a citizen of Mexico, was charged in the Superior Court of California with two counts of possessing heroin. Upon her plea of guilty, she was convicted and placed on probation for three years, on condition that she serve six months in jail and pay a fine of $1,000 (Pet. App. C). In De-

cember 1961 she was ordered deported on account of her narcotics conviction, pursuant to section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11) (*supra*, pp. 2-3). In November 1962, having served her jail sentence, petitioner again appeared before the Superior Court, where her probation was terminated. Pursuant to section 1203.4 of the California Penal Code (Pet. 4), she was permitted to withdraw her guilty plea, and the information was dismissed (Pet. App. D). Thereupon petitioner moved to reopen the deportation order on the ground that she was no longer deportable under section 241(a)(11). The Board of Immigration Appeals denied the motion and dismissed the appeal (Pet. App. A), and the court of appeals affirmed (Pet. App. B).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with that of any other court. There is therefore no occasion for further review.

Whatever may be the case as to other types of offenses (see sections 241(a)(4), (b), *supra*, pp. 2, 3),[1] it is clear that Congress intended that an alien adjudged guilty of a narcotics offense should be deportable regardless of any provisions of State law mitigating the penalty. *Matter of A. F.*, 8 I&N Dec. 429, Pet. App. E; *Arrellano-Flores* v. *Hoy*, 262 F. 2d 667 (C.A. 9), certiorari denied, 362 U.S. 921;

[1] As to crimes other than narcotics offenses, the administrative position is that a State decision to set aside a conviction under a probation system such as California's precludes deportation under section 241(a)(4). *Matter of G.*, 9 I&N Dec. 159.

Gutierrez v. *Immigration and Naturalization Service*, 323 F. 2d 593 (C.A. 9), certiorari denied, 377 U.S. 910 (all cases involving essentially the same issue presented here). Indeed, it is immaterial for purposes of section 241(a)(11) whether the alien is given any State penalty at all. While the section originally applied only to aliens convicted *and* sentenced for narcotics offenses (46 Stat. 1171), it was amended over twenty years ago to delete the sentencing requirement (54 Stat. 673). And while Congress, in the case of other crimes, has given effect to pardons and recommendations against deportation by sentencing judges (section 241(b)), it has expressly provided to the contrary in the case of narcotics offenses. Narcotic Control Act of 1956, 70 Stat. 567, 575, amending section 241(b).[2] As the Attorney General observed in ruling that aliens adjudged guilty of narcotics offenses are deportable under section 241(a)(11) regardless of the remedial provisions of California law, "Congress has progressively strengthened the deportation laws dealing with aliens involved in [narcotics] traffic." *Matter of A.F.*, Pet. App. 51.[3] Thus the California probation statute, which provides

[2] For purposes of "clarification", so that "all doubt would be removed" (S. Rep. No. 1997, pp. 16, 20–21, 34–35; H. Rep. No. 2546, p. 17, 84th Cong., 2d Sess.), the following language was added to section 241(b): "The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable * * * under subsection (a)(11) of this section."

[3] The Attorney General's decision on the point in issue here was made upon reopening a case in which a deportation order had been affirmed by the Ninth Circuit, *Arrellano-Flores* v. *Hoy*, *supra*. A petition for certiorari to review that case was pending in this Court until after the Attorney General's ruling, at which time certiorari was denied.

in effect a means of pardoning a convicted narcotics offender, cannot affect the operation of section 241 (a)(11). This is particularly clear where, as here, the conviction, which has never been challenged on the merits, resulted in six months' imprisonment and a substantial fine.

There is no doubt that, under California law, petitioner was convicted of a narcotics offense. By its own terms, California Penal Code section 1203.4 provides that an accusation against a person may be dismissed *"if he has been convicted,"* and that, when the accusation is dismissed, the defendant "shall thereafter be released from all penalties and disabilities resulting from the offense or crime *of which he has been convicted."* (Emphasis added.) It also provides that "such prior conviction" may be pleaded and proved in a subsequent prosecution for any other offense. And as the court below pointed out, Pet. App. 8 n. 3, a conviction "expunged" under section 1203.4 remains a "conviction" for many purposes under California law.

None of the cases cited by petitioner (Pet. 7, 9) as conflicting with the decision below involved narcotics offenses or section 241(a)(11). *Pino* v. *Landon,* 349 U.S. 901, involved deportation under section 241(a)(4), which, as we have noted, has been treated quite differently from section 241(a)(11), both by Congress and by those responsible for the administration of the Act. *Sawkow* v. *Immigration and Naturalization Service,* 314 F. 2d 34 (C.A. 3) and *Holzapfel* v. *Wyrsch,* 259 F. 2d 890 (C.A. 3), likewise involved section 241(a)

(4). In *Sawkow,* the defendant was convicted on his plea of *non vult,* allowed to withdraw this plea and stand trial, and finally convicted after trial. The court held that the recommendation of the sentencing judge against deportation, made at the time of defendant's conviction after trial, was made "at the time of first * * * passing sentence" and was therefore efficacious under section 241(b). In *Holzapfel,* it was held that the court's order that the defendant undergo a series of psychiatric examinations pursuant to the New Jersey Sex Offenders Act was not a "sentence" within the purview of section 241(a)(4). Plainly the language quoted from these cases by petitioner has no relevance here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

AUGUST 1965.

END